

Update to 9/12/2010 Memo:

SEXUAL HARASSMENT AND SEXUAL ASSAULT IN THE MILITARY

February 2012

Congress has again mandated improvements in DoD's Sexual Assault Prevention and Response Program. Secretary of Defense Panetta recently announced the implementation of some of these changes, promising more revisions to the policy in the coming months.

Provisions of the new National Defense Authorization Act:

- 1) For the first time, sexual assault victims are to be given access to legal assistance from military JAGs or civilian attorneys, and are to be advised of this by Victims Advocates or most other "first responders." (10 USC 1565b) This right will be available to those who make restricted or unrestricted reports, and is extended to military dependents as well as servicemembers. Since neither SAPR VAs nor command SARCs are tasked with actual advocacy for victims, this change may provide important protections against mishandled investigations and all-too-common retaliation for reporting assaults. Legal assistance for assault victims is linked to 10 USC 1044, which states that the military "may" provide legal assistance as resources allow to assist with personal civil matters for servicemembers unable to afford private counsel. Presumably assistance for sexual assault victims is not intended to be discretionary. The new policy is to go into effect 180 days after the NDAA's enactment.
- 2) Victims who make unrestricted reports will have the right to request expedited temporary or permanent transfer or change of duty station, "so as to reduce the possibility of retaliation against the member for reporting the sexual assault or other offense." Commanding officers are not required to grant these requests, though they must grant or deny within 72 hours. Victims may request review of a denial by the first general officer or flag officer in the chain of command, whose decision must also be made within 72 hours. (10 USC 673) [See discussion of new DoD Directive-Type Memorandum on this issue, below.]
- 3) Sexual Assault Response Coordinators and Sexual Assault Victims Advocates are to be assigned to each brigade or equivalent unit of the services, although the Secretaries may increase that number as they deem appropriate. Only DoD civilian employees and members of the military may serve in these capacities, beginning October 1, 2013. The new law also requires training and certification of all SARCs and SAPR VAs, commensurate with the professional training available for equal opportunity advisors, also effective October 1, 2013. DoD is required to consult with experts in advocacy and sexual assault prevention and response training from outside DoD in developing certification programs.

- 4) Service-wide training and education programs for sexual assault prevention and response will be required, using programs developed in consultation with experts outside DoD, and encompassing initial entry and accession programs, annual refresher training, professional military education, peer education and all specialized leadership training. First responders, including firefighters, emergency medical technician, law enforcement officers, military criminal investigators, healthcare personnel, judge advocates and chaplains will have sexual assault response training including in their initial and recurring training.
- 5) A comprehensive policy is to be developed for the retention of evidence and records in sexual assault cases, to ensure preservation of records and evidence for periods of time that allow victims to substantiate claims for veterans benefits, support criminal or civil prosecutions, and assist in DoD record-keeping. By October 1, 2012, physical evidence shall be retained for not less than five years, and documentary evidence shall be retained for the length of time that sexual assault investigative records must be maintained. This provision also requires that court-martial records of trial be provided to sexual assault victims if they have testified during the proceedings. (10 USC 854, UCMJ Art. 54) Victims must be notified of the right to receive records of trial as soon as they are authenticated.

Changes in the new DoD Directive 6495.01 :

- (a) Like the NDAA, the Directive now extends sexual assault policies to “military dependents 18 years of age and older who are eligible for treatment in the military healthcare system...and who were victims of sexual assault perpetrated by someone other than a spouse or intimate partner.” (Victims of domestic sexual assault are covered separately by the military’s Family Advocacy Program.) In addition, DoD civilian employees and their family dependents 18 years and older are to be provided limited medical care (emergency services) and limited services of a SARC and SAPR VA while undergoing emergency care, if they are stationed or performing duties outside the continental US and are eligible for treatment in military healthcare facilities. US citizen DoD contractors have similar limited coverage when they are authorized to accompany the armed forces in contingency operations outside the US. The Directive also expands the full policy to servicemembers who were victims of sexual assault prior to enlistment or commissioning.
- (b) Sexual assault cases are now to be designated as “emergency cases” requiring expedited response and medical treatment; the text notes that, “regardless of whether physical injuries are evident,” these cases may involve, among other things, serious psychological injury. This section (para. 4.j.(2)) points out that victims should be treated uniformly, consistent with the military’s “Victim Centered Care” policy, “regardless of their behavior because when severely

traumatized, sexual assault patients may appear to be calm, indifferent, submissive, jocular, angry, emotionally distraught or even uncooperative or hostile towards those who are trying to help.”

- (b) Unlike prior regulations, which specified a response time, the Directive states that “[a]n immediate, trained sexual assault response capability...shall be available for each report of sexual assault in all locations, including in deployed locations. The response time may be affected by operational necessities, but will reflect that sexual assault victims shall be treated as emergency cases.”
- (c) For the first time, the Directive expressly links sexual assault reports to complaints and reports protected under the Military Whistleblower Protection Act. Para. 4.h of the Directive states that “[v]ictims of sexual assault shall be protected from coercion, retaliation, and reprisal in accordance with DoDD 7050.06,” “Military Whistleblower Protection.”
- (d) The Directive retains prior regulations’ preference for unrestricted reporting, which allows investigation and command action. However, new language has been added which points out that unrestricted reporting may be a barrier for victims who do not desire command or law enforcement involvement; “Consequently, the DoD recognizes a fundamental need to provide a confidential disclosure vehicle via the Restricted Reporting option.” It remains to be seen whether victims will continue to be pressured to choose unrestricted reporting.
- (e) Para. 4.k.(e) prohibits disclosure of confidential information (made in restricted reports) by SARCs or SAPR VAs, even when a command has obtained separate evidence of an assault and initiates an independent investigation. Improper release of confidential communications or improper release of medical information may result in disciplinary action or other adverse personnel or administrative action.

To date, only one of the new provisions, on transfers of sexual assault victims, has been set out in detail. On December 16, 2011, DoD issued Directive-Type Memorandum 11-063, “Expedited Transfer of Military Service Members Who File Unrestricted Reports of Sexual Assault.” While the service Secretaries are to promulgate implementing regulations, the memorandum provides considerable detail.

As noted above, victims of sexual assault do not have a right to transfer from their units, but the memo establishes “a presumption...in favor of transferring a Service member (who initiated the transfer request) following a credible report of sexual assault.” The victim may request a temporary or permanent transfer either to another unit within the command or to a duty station outside the command.

The CO, or the appropriate approving authority, is to make a credible report determination at the time the request is made “after considering the advice of the supporting judge advocate, or other legal advisor concerned, and the available evidence.” (A credible report is defined as one where there are reasonable grounds to believe that an offense constituting sexual assault has occurred.) Victims must be notified of this option at the time they report an assault, or as soon as practicable thereafter. As noted in the discussion of the NDAA, COs must respond to requests within 72 hours. Where transfer is granted, that process is also to be expedited. If the request is disapproved, the victim may appeal to the first flag or general officer in the command, or the civilian employee of equivalent status; this official must also act on the request within 72 hours.

The CO or appropriate approving authority must provide reasons and justification for a transfer or, presumably, for denial of a transfer. He or she is required to consider a number of factors, including the member’s reasons for the request; potential transfer of the alleged offender rather than the victim; the nature and circumstances of the offense; whether a temporary transfer would suffice to meet the victim’s and unit’s needs; the training status of the victim; availability of positions in other units within the broader command; the potential impact on the investigation and disposition of the sexual assault case; the alleged offender’s location and status (servicemember or civilian); and “other pertinent circumstances or facts.”

The memorandum also directs COs to counsel the victim to ensure she or he is fully informed of reasonable foreseeable career impacts of a transfer, the potential impact on the case against the alleged offender, or other consequences of the request. Victims must also be warned that they may need to return for the prosecution of the case, should there be a prosecution.

The services are also required to promulgate regulations for members of the Reserve and National Guard. Here, “the command should allow for separate training on different weekends or times from the alleged offender or with a different unit in the home drilling location” to avoid subjecting the victim to an undue burden of transfer elsewhere. Transfer of the alleged offender is to be considered as an alternative and, “[a]t a minimum, the alleged offender’s access to the Service member who made the unrestricted report shall be restricted, as appropriate.”